No. 83-990

IN THE

Supreme Court of the United States

October Term, 1983

THE SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS; PHILLIP RUNKEL, Superintendent of Public Instruction of the State of Michigan; STATE BOARD OF EDUCATION OF THE STATE OF MICHIGAN; LOREN E. MONROE, State Treasurer of the State of Michigan; IRMA GARCIA-AGUILAR and SIMON AGUILAR, BRUCE and LINDA BYLSMA, ROBERT and PENELOPE COMER, CLARENCE and ROSALEE COVERT, SCIPUO and JANICE FLOWERS, JOHN and SHIRLEY LEESTMA,

Petitioners,

vs.

PHYLLIS BALL; KATHERINE PIEPER; GILBERT DAVIS; PATRICIA DAVIS; FREDERICK L. SCHWASS and WALTER BERGMAN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF, THE AMERICAN CIVIL LIBERTIES UNION, AMERICANS FOR RELIGIOUS LIBERTY, THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, THE NATIONAL COMMITTEE ON PUBLIC EDUCATION AND RELIGIOUS LIBERTY AND THE NATIONAL EDUCATION ASSOCIATION

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QUESTION PRESENTED

1) Does the Establishment Clause permit a public school district to enter into an agreement with a religious school to operate "shared-time" and "community education" programs in religious schools?

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Interests of the Amici

The American Jewish Congress is a membership organization of American Jews founded in 1918 to protect the religious, political and civil rights of Jews and to promote the principles of democracy. It is committed to the preservation of the great freedoms secured by the First Amendment, and especially the freedoms secured by its Establishment and Free Exercise clauses.

In 1964, it adopted a resolution opposing "shared time" programs, even when conducted in public school facilities, on the ground that such programs "would threaten gravely to undermine the public school, one of the bulwarks of American democracy."

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members. It

was founded over 60 years ago and is dedicated to defending and preserving the principles embodied in the Bill of Rights. The ACLU has been involved in many of the leading First Amendment cases by which separation of church and state has been maintained.

The National Coalition for Public Education and Religious Liberty is a national coalition of organizations, listed in Appendix A, sharing the common objectives of preserving religious freedom and the separation of church and state in public education.

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League ("ADL") was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all

creeds and races and to combat racial and religious prejudice in the United States. The ADL has consistently adhered to the principle that these goals, and the general stability of democracy, are best served by the separation of church and state.

In support of this principle, the Anti-Defamation League has previously filed amicus briefs before this court in numerous cases. Thus, the League is able to bring to the issues raised on this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedom.

The National Education Association (NEA) is a nationwide employee organization, with a current membership of some 1.7 million members, the vast majority of whom are employed by public education institutions. NEA has a strong interest in

preserving religious freedom and maintaining the separation of church and state in public education.

Americans for Religious Liberty is a nationwide, nondenominational, nonpartisan, nonprofit, educational organization of individual citizens and taxpayers, dedicated to defending the First Amendment principle of separation of church and state. It maintains that virtually all forms of direct or indirect public financial aid to religious private education violate the Establishment Clause.

All the amici have frequently participated in litigation challenging aid to religious schools because they are committed to the integrity of the Establishment Clause, as well as the meaningful survival of the American public

school system. That system, together with the principle of church-state separation, are among this nation's most significant contributions to contemporary civilization. Because the integrity of both would be endangered if the decision below is reversed, they respectfully submit the attached brief with the consent of the parties.

Appendix A

The constituents of National PEARL are: American Association of School Administrators; American Civil Liberties Union; ACLU National Capital Area; ACLU of Connecticut; American Ethical Union; American Federation of Teachers; AFL-CIO; American Humanist Association; American Jewish Congress; Americans for Religious Liberty; Americans United for Separation of Church and State; Anti- Defamation League of B'nai B'rith; Baptist Joint Committee on Public Affairs; Board of Church and Society of the United Methodist Church; Central Conference of American Rabbis; Illinois PEARL; Michigan Council About Parochiaid; Minnesota Civil Liberties Union; Missouri Baptist Christian Life Commission; Missouri PEARL; New York PEARL; Monroe County, New York PEARL; Nassau-Suffolk PEARL; Michigan Council Against Parochiaid; National

Association of Catholic Laity; National Council of Jewish Women; National Education Association; National Women's Conference; Preserve Our Public Schools; Public Funds for Public Schools of New Jersey; New York State United Teachers; Ohio Free Schools Association; Union of American Hebrew Congregations; Unitarian Universalist Association.

STATEMENT OF THE CASE

Introduction

Michigan authorizes, and partially finances the operation by local public school districts of "shared time" and "community education" programs for students of religious schools. The Grand Rapids School District ("District") in partnership with the religious schools of Grand Rapids, operated an extensive program of such classes on the premises of each of the religious schools in the city.*

A. The Grand Rapids Programs

i. The Shared Time Classes

The "shared time" classes took place during regular religious school hours on religious school premises. The basic

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* References to the opinions of the lower courts are to the appendix to the petition for certiorari and are cited as "___a." References to the Joint Appendix are cited as "J.A."

"shared time" curriculum included art, music, physical education, industrial arts, and remedial and enrichment reading and math classes. [76a-77a]. It was designed to complement the educational program offered by the religious schools.

ii. The "Community Education" Classes

"Community education" classes took place before and after regular instructional hours. Some classes were recreational, but many were curriculum related such as educational games, [J.A. 201, 211, 212], computers [J.A. 210, 213], yearbook [J.A. 207, 210, 213], math and reading games [J.A. 207-208, 210, 211], drama [J.A. 211], and educational films. [J.A. 212] The District Court found, in fact, that "community education" programs were available to public school students, "usually as a part of their more extensive regular curriculum." [78a-79a; J.A. 167]

iii. Student Participation

Although in theory open to all, participation in both programs was limited, in actual practice, to students attending the host religious school. Since identical classes were offered in each public school, it was unnecessary for public school students to attend classes held in the religious schools. [Brief at 12, J.A. at 326a]

Students participating in the remedial and enrichment reading and math "shared time" classes were chosen by public school teachers from students recommended by the religious schools. [See, e.g., J.A. 6, ¶14; 64, ¶12 (reading); 60, ¶17; 75, ¶19 (math)] Attendance at other "shared time" classes was determined solely by the religious schools. [J.A. 42, ¶14] Participation in "community education" classes was entirely voluntary. [J.A. 186]

iv. The Teachers

"Shared time" teachers were public school teachers assigned to particular religious schools by public school authorities, [J.A. 68, ¶9]. "Community education" teachers, by contrast, were typically recruited from each religious school's faculty. In order to attract students to these "after hours" classes, it was necessary to have teachers who the participating students knew and liked. [J.A. 186-87, 78a]

The District Court noted that, as a result of the dual roles assigned them, "community education" instructors might teach the same course twice, sometimes as a public school "community education"

teacher and sometimes as a religious school teacher. [117a-118a]*

"Shared time" teachers were repeatedly warned by public school authorities that they were not to discuss religion in their classes. [J.A. 53-54, ¶¶11-13; 58; 72-3, ¶16; 78; ¶10; 82; 86, ¶9; 90, ¶9; 95, ¶9; 99]

The record is silent about what instructions were given "community education" teachers, what supervisory mechanisms existed to insure enforcement of those instructions, and the extent to which these prophylactic measures were successful.

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* For example, one teacher at Christian High School taught physical education both as a faculty member of the school and as a member of the "shared-time" faculty of the public schools. This same teacher served as the religious school's basketball coach. The District Court termed this situation "bizarre" and "unfair" to the teacher, and expressed concern for his students "who [were] required to pretend during the day that they are somehow different than they are at night." [117a-118a]

v. The Facilities

The "lease" under which the public schools used religious school facilities designated no specific room for use by public school classes and did not reserve "rented" space for use exclusively by the public schools. The lease was in effect only on "scheduled school days during the school year" [J.A 202-04] and did not provide that the leased premises could not be used for religious school classes when "shared time" classes were not in session. The record shows that many "shared time" classes were offered in different classrooms on different days. [J.A. 69, ¶10; 76, ¶26; 99; 100]

District regulations required the display of a sign designating "leased" space as a public school when "shared time" classes were in session, [J.A. 200] but not at other times. [J.A. 64, ¶10; 214; 75a]

While "shared time" guidelines issued by the District did require the removal of religious artifacts from leased space [J.A. 214], and teachers were told of this regulation, [J.A. 64, ¶9; 69, ¶10; 85, ¶22] this prohibition was not always honored. [J.A. 62, ¶24, 65, ¶13; 76, 93-4, ¶20].

On occasion, "shared time" teachers had to ask that religious symbols be removed from "shared time" classrooms [J.A. 62, ¶24; 94, ¶20] and at other times they were instructed to simply ignore their presence. [J.A. 76, ¶26]*

The presence of the programs on religious school premises gave students a feeling of being in their own place and helped "integrate" the shared time program with the religious school program. [J.A. 104, ¶14]

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* "I do on occasion see religious symbols in rooms which may be visited once or twice a day. Teachers are specifically directed to ignore such and conduct the assigned lesson. Religious symbolism ... is one area which I check during each visit."

The "public school" programs did not take place on religious school holidays, even when the public schools elsewhere were in session [79a, J.A. 96, ¶11; 103]

vi. Curriculum and Materials

Although the record does not reflect any overt intrusion of religion into the enrichment and remedial reading and math classes, [see, e.g., J.A. 68, ¶24], the "shared time" music program was subject to sectarian influences and reflects the close coordination between the religious and "public " schools.

Music teachers taught a program of vocal music [J.A. 91] which included religious music. [J.A. 90] "Shared time" music teachers were told, in response to requests from the religious schools, that

they could prepare students for religious school "Christmas programs" [Id.] and that they might "use any text, including a religious text, they would feel comfortable using in a public school." [J.A. 93] Religious school teachers were encouraged to attend "shared time" music classes, and received a lesson plan and suggested activities for followup. [J.A. 93-4]

vii. Political Uses of the "Shared Time" and "Community Education" Programs

The District Court found that actual political controversy existed over the "shared time" and "community education" programs.

> In preparation for the March 1980 school millage campaign, the Grand Rapids Board of Education published Citizens Handbook Millage - '80, ... In that booklet, the Board of Education ... made a purposeful effort to influence favorably the taxpayers sending children to non-public schools on the basis of benefits conferred under the programs challenged herein....

> It is sensible ... for the District to appeal to those ... who ... send their children to private schools. While sensible, it is also a political appeal to the voting community. As such, it invites opposition, as do all political propositions. [112a-114a; 28a-28a]

B. The Participating Religious Schools

The District Court and the Court of Appeals found that the religious schools were "pervasively religious" as that term is used in this Court's parochial school aid decisions. [109-21a; 79a-90a] Each is an effort to create a "community of faith." [J.A. 107, ¶10; 110, ¶10; 149, ¶14; 271] Each conducted classes in religion, [J.A. 110, ¶11] which students were typically required to attend* and each offered mandatory periods of group worship because "recognition of God is part of total educa-

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* Where students of different faiths were admitted, they were sometimes required to substitute instruction in their own faith for that of the school. In Catholic schools, students of other faiths could be excused from religious services upon parental request. [J.A. 113, ¶22]

tion." [J.A. 121-22, ¶9; 136, ¶10] Academic subjects, while taught in secular form, are examined from a religious point of view. [J.A. 111, ¶11; 120, ¶6; 134, ¶7; 151-52, ¶22]*

Each participating school extended at least a preference in admission to students of the faith sponsoring the school. [J.A. 143, ¶6; 148, ¶13] Some required a commitment to abide by the school's religious code of conduct. [J.A. 140, ¶8; 148, ¶12] In each, the majority -- typically the overwhelming majority -- of students, teachers, and administrators, shared a common faith. [J.A. 107, ¶9; 117, ¶29; 119, ¶4; 260; 261]

Teachers were either expected to adhere to the faith of the school [J.A. 151,

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* The members of the Grand Rapids Christian Association believed, for example, that "the Word of God must be an all-pervading force in the educational program." [J.A. 271; 270]

¶19] or to teach within the "general philosophic framework of the school." [J.A. 117, ¶28; 118; ¶3]

Each participating school held itself out to the public as religious, and as offering an education compatible with, and arising from, its religious world views. [See, e.g., J.A. 279-289]

Governance of the religious schools was typically vested in a board of directors largely, and frequently exclusively, composed of members of the denomination operating the school and members of its clergy. [J.A. 115, ¶25; 133, ¶5, 271]

C. The Litigation

Six individual taxpayers and Americans United for Separation of Church and

State* filed suit challenging the District's "shared time" and "community education" programs. The School District of the City of Grand Rapids, the State Superintendent of Public Instruction, and the State Board of Education were named as defendants [hereafter "petitioners" or the "District"]. Parents of participating students intervened, and are also petitioners here. With minor exceptions,** the District Court held the program unconstitutional.

Petitioners appealed from so much of the judgment as struck down:

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* The District Court found that the individuals had taxpayer standing. However it dismissed Americans United for want of standing, citing Valley Forge Christian College v. Americans United for Separation of Church and State, 102 S.Ct. 752 (1982). No cross appeal was filed from that action.

** The District Court upheld "drownproofing," outdoor education and driver education programs. Respondents did not appeal from that judgment.

a) "shared time instruction in the elementary schools," (remedial and enrichment reading and math, art, music and physical education);

b) "shared time" remedial high school math;

c) "community education" in "leisure-time activities" in the elmentary schools.

The judgment, was, however, affirmed by the Court of Appeals.

SUMMARY OF ARGUMENT

The Grand Rapids "shared time" and "community education" programs are operated by the public school system in partnership with religious schools. That partnership includes joint operational responsibilities for core-curriculum education at the religious school, and involves joint students, faculty, facilities, financial resources and administrative bureaucracy. Such a fusion of the public school and religious school systems violates the Establishment Clause:

1. The "fusion" of governmental and religious functions is one of the principal dangers the Establishment Clause was designed to prevent. Larkin v. Grendel's Den, 103 S.Ct. 505 (1982). Although government and religion need not be adversaries, they also may not undertake a joint education program. School District of Abington Township v. Schempp, 374 U.S. 203 (1963). In this case the extensive functional and administrative interrelationships between the public school and religious school systems involve precisely that form of "institutional entanglement," Lynch v. Donnelly, 104 S.Ct. 1355, 1367 (1984) (O'Connor, J., concurring) which threatens the independence and integrity of both government and religion. Moreover, the "fusion" of functions in this case is far more severe than other government/religion partnerships in education which have previously been declared unconstitutional.

Meek v. Pittenger 421 U.S. 349 (1975); McCollum v. Bd. of Educ., 333 U.S. 204 (1947).

2. The "shared time" and "community education" programs are objectionable when measured against the tripartite test enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971). Although amici do not contend that the District's programs were established with a religious purpose, they clearly have the effect of advancing religion and result in an impermissible entanglement of government and religion, including actual political divisiveness.

ARGUMENT

I. THE SCHOOL DISTRICT HAS ESTABLISHED A CONSTITUTIONALLY IMPERMISSIBLE PARTNERSHIP WITH THE RELIGIOUS SCHOOLS

This Court has repeatedly and consistently recognized that the "core rationale underlying the Establishment Clause is preventing "a fusion of governmental and religious functions,"

School District of Abington Twshp. v. Schempp, 374 U.S. 203, 222 (1963)." Larkin v. Grendel's Den, 103 S.Ct. 505, 512 (1982). Compare, McCollum v. Bd. of Educ., 333 U.S. 203 (1948), with Zorach v. Clauson, 343 U.S. 306 (1952).

Such a "fusion" necessarily entails a dangerous "institutional entanglement," Lynch v. Donnelly, supra, 104 S.Ct. at 1367 (O'Connor, J., concurring) that threatens the independence of religious institutions, as well as poisoning the institutions of government by creating "political constituencies defined along religious lines." Id., at 1366.

Moreover, while government and religion certainly need not be hostile adversaries, any union of the two in a joint undertaking -- particularly an enterprise as sensitive as religious education -- will have the effect of advancing religion, by providing a "significant

symbolic benefit to religion" generally, Larkin v. Grendel's Den, supra, at 511, by reason of the power inherent in that governmental alliance, and by affording practical resource and financial assistance to the religious institutions.

In this case, the District's program brings about precisely such an impermissible fusion of public and religious education. Here, the religious enterprise receives substantial and recurring government support, Everson v. Bd. of Educ., 330 U.S. 1 (1947), and the government has significant operational responsibility for the educational program of the religious schools. In short, it is no exaggeration to say that the District has, in effect, created a system of public religious education.

By ignoring the constitutionally distinct roles of government and religion -- even viewed from a modern, later

twentieth century perspective, see e.g., Lynch v. Donnelly, supra; Marsh v. Chambers, 103 S.Ct. 3330, 3322 (1983); Mueller v. Allen, 103 S.Ct. 3062, 3069 (1983)* -- this joint venture involves just such an "establishment" as the First Amendment was designed to avoid:

> Primary among the evils against which the Establishment Clause protects "have been sponsorship, financial support, and active involvement of the sovereign in religious activity," Meek v. Pittenger, 421 U.S. 349, 359 (1975), quoting Walz v. Tax Commission 397 U.S. 664, 668 (1970).

In Meek, the Court struck down a government program in which special

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* Mueller v. Allen is considered at pp. 43- 44, infra. Neither Lynch nor Marsh involved a pervasive, continuing and institutionalized joint enterprise in the sensitive area of education of the young, an area which has been the direct subject of the long line of decisions of this Court noted in this brief. None of these three cases can be deemed to have overruled sub silentio the firmly established principles supporting the decisions below. Indeed, in Lynch v. Donnelly, supra, 104 S.Ct at 1366, this Court reaffirmed their validity.

education courses (remedial and accelerated reading instruction) and auxiliary services (psychological counseling and speech therapy) were provided by public school officials on religious school premises.* The Court held that in the face of the "massive aid provided the church-related nonpublic schools," (421 U.S., at 365) it would "simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by ... church related" schools (id.).

In this case, however, evidence of the prohibited government/religion "fusion" is far more extensive, and involves a more serious combination and confusion of roles,

*The Meek Court also rejected that portion of the challenged statutes permitting religious schools to use public school system "instructional materials" (projectors, laboratory equipment, and the like), although the Court found constitutionally permissible the direct "loan" of textbooks to students attending religious schools. Id.

than anything presented in Meek v. Pittinger, supra. Here, the public and religious systems share students (whose entry to the "shared time" program is controlled by religious school officials); here they share faculty; here they share financial and professional responsibility for the provision of core-curriculum educational services to their joint students; here they share a common, undifferentiated space on the premises of the religious schools; and, finally, here they share an extensive administrative structure to coordinate the scheduling of 1500 classes offered by 470 nominal "public school" teachers in the religious schools.

[118a-119a]* Given that pervasive

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* Thomas v. Schmidt, 397 F. Supp. 203 (D. N.H. 1975), aff'd, 539 F.2d 701 (1st Cir. 1976), at 214, stated the point well:

> A parochial school and a public school in a dual enrollment arrangement are not merely sharing the same building; they are sharing the same students. The two schools at best effectuate a partnership, if not for all intents and purposes a complete merger .... Thus when the Court in Paire refers to "an artificial public school within a church school," it refers to a public school that is not merely physically within the same building, but one that is functionally the very same school.

Accord, Americans United v. Porter, 485 F.Supp. 432 (W.D. Mich. 1980); Americans United v. Oakey, 337 F.Supp. 545; D.Vt. 1972); Americans United v. Paire, 348 F.Supp. 506 (D. N.H. 1972), vacated and remanded, 475 F.2d 462 (1st Cir. 1973) after remand, 359 F.Supp. 505 (D. N.H. 1973); School Dist. v. Neb.State Bd. of Educ., 118 Neb. 1, 195 N.W. 2d 161, cert. denied, 409 U.S. 921 (1972).

Arguably to the contrary is PEARL v. Hufstedler, 489 F.Supp. 1248 (S.D.N.Y. 1980), app. dismissed (on grounds of timeliness), 449 U.S. 808, (1980), but that case is distinguishable on its facts because the Court found the schools in question to be not "pervasively religious."

entanglement, it is not surprising that the Court of Appeals in this case concluded that if the Grand Rapids program be deemed constitutionally permissible then "the separation of church and state will be effectively ended in the field of public education." [40a].

Of course, some "cooperation" between government and religion is inevitable, and indeed desirable. But there are constitutional limits on such cooperative efforts that can be discerned from juxtaposition of McCollum v. Bd. of Educ., supra, and Zorach v. Clauson, supra.

In McCollum, the Court examined a program of religious instruction in the public schools; this case involves public education programs in the religious schools. Both are prohibited by the Establishment Clause for the same reasons. Indeed, in McCollum the Court rejected a scheme which, compared to the facts of this

case, involved only a relatively modest "fusion" of church and state: in McCollum the religious classes in question were few in number, conducted only weekly for no more than 45 minutes, and involved no expense, no faculty overlap* and no joint administrative structure.

By contrast, in this case the "fusion" was deep and solid. Thus, in this case, far more than in McCollum, the District's program offends the Establishment Clause because of the degree to which it "assists and is integrated with the program of religious instruction carried on by the separate religious sector." 333

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* Joint faculty arrangements are both formally established in the community education program (where the public system literally "hires" regular church school teachers), and more circumspectly, though nonetheless effectively accomplished, in the shared-time program (where former church school teachers are hired by the public system to work in the very same church school that used to employ them directly).

U.S. at 209; see also id. at 231 (Frankfurter, J., concurring).

That constitutional proscription against blending secular and sectarian education was underscored by the decision in Zorach, where the Court upheld the "early release" of public school students for religious training only because that program successfully avoided the church-state partnership found objectionable in McCollum.

Thus, in Zorach, the religious instruction did not begin (for the children involved in the program) until after public school classes had ended, and the two school systems did not share facilities, teachers, finances or any other resources. Of course, in Zorach there was some measure of cooperation between government and religion (id. at 314); but the Court also recognized the constitutional distinction between cooperation and confederation:

> Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education, nor use secular institutions to force one or some religion on any person. 343 U.S. at 314 (emphasis added).

Furthermore, the constitutional significance of that "blend" of secular and sectarian education is heightened, not diminished as petitioners suggest (Brief at 29-30), by a government program that complements, rather than displaces, the core religious school educational program. The dovetailing of the public schools' offerings with those of the religious schools suggests a common venture, not the two independent endeavors the Constitution

demands.*

Finally, in an effort to save these otherwise unconstitutional programs, the District has resorted to two transparent legal fictions calculated to create the appearance of separateness where none exists.

First, the so-called lease agreement is, as a matter of real property law, more aptly labeled a license, since no particular space is specified, and classes are not confined to a particular room, United Coin Meter Co. v. Gibson, 311 N.W. 2d 442 (Mich. Ct. of Appeals 1981); 2 Powell, Real Property, ¶220 (4) at pp. 212-13 (1984).

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* The existence of a public-religious partnership in the education of religious school students is exemplified by the "shared time" music education program, in which religious school teachers are invited to sit in on the "pubic school" classes and as part of which "public school" teachers cooperated with the religious schools in creating Christmas and other religious holiday assembly programs.

More importantly, for Establishment Clause purposes, the existence of the lease lends no support to the District's contention that the two challenged programs have an existence demonstrably separate from that of the religious schools in which they operate. No space is reserved for those programs; there is no prohibition on public and religious schools alternating the use of a particular room; there is not even an absolute assurance that sectarian symbols will not be displayed in this "leased " space.

Second, the portable signs posted in rooms being used in the program proclaiming these rooms to be public schools, like the posted disclaimers of sectarian purpose rejected by this Court in Stone v. Graham, 449 U.S. 39 (1980), should not blind this Court to the fact of a pervasive cooperative educational venture. These legal fictions notwithstanding, the District has

blended secular and religious education in exactly the way the Establishment Clause forbids.

II. APPLICATION OF THE TRIPARTITE TEST REQUIRES AFFIRMANCE.

A. The "Shared Time" and "Community Education" Programs Are Invalid Under the Tripartite Test

The tripartite test for Establishment Clause violations was first enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971), and restated most recently in Lynch v. Donnelly, supra. As Justice O'Connor pointed out in her concurrence in Lynch v. Donnelly, 104 S.Ct. at 1366, the test serves to ferret out those relationships which impermissibly fuse church and state. It requires that, to be constitutional, a governmental practice must have a secular

purpose,* a direct, and substantial secular effect, and must not unduly enmesh government and religious institutions in the affairs of each other, either administratively or politically. Lynch v. Donnelly, supra, 104 S.Ct. at 362.

B. Administrative Entanglement

Aid to religious schools frequently founders on constitutional shoals because

* The amici do not contend, in light of numerous decisions of this Court involving aid to religious schools, that the District's program lacks a secular purpose.

The U.S. Catholic Conference, in its brief amicus curiae (pp. 17-8) suggests that the presence of a secular purpose is a factor weighing in favor of constitutionality. This Court implicitly rejected that argument in Lemon, PEARL v. Nyquist, Meek v. Pittenger and Wolman v. Walter, 433 U.S. 229 (1977).

The contention of the amicus amounts to a plea for this Court to balance a valid secular purpose against Establishment Clause values, something this Court has never done. Imposing a balancing test in Establishment Clause cases would substantially undo what the founders commanded -- to keep government from involvement with religion.

it creates a need for "comprehensive, discriminating, and continuing state surveillance," Lemon v. Kurtzman, supra, 403 U.S. at 619, to insure that the aid is not misdirected to sectarian uses.

It is, therefore, ironic that petitioners in this case, in attempting to demonstrate that the Grand Rapids "shared time" and "continuing education" classes do not advance religion, emphasize the extent to which the District has created just such a system of government surveillance for these programs. [Brief at 35-41]

Thus, petitioners argue that "shared

time"* teachers are repeatedly instructed on the prohibition against religious instruction, both orally and in writing, and that religious school officials are told of it as well. Supervisors check compliance with these instructions, as well as classrooms, and at times asked religious

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* Petitioners are silent about the measures taken to insure that the "community education" program remains free of sectarian influences. [79a] The District Court noted the particular difficulties which would be encountered in such an effort, because the program uses religious school teachers [Id.] 117a-118a) and because those teachers taught courses in the program similar to the ones they taught for the religious schools [Id.]

The failure to institute such controls is constitutionally fatal. "The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion....," Lemon v. Kurtzman, supra, 403 U.S. at 619.

But such measures would in any event be insufficient. Like the state subsidized teachers at issue in Lemon, the "community education" teachers who are primarily employed by a religious organization, "would find it hard to make a total separation between secular teaching and religious doctrine." (403 U.S. at 618-19)

school officials to remove such symbols. Formal mechanisms exist for teachers to report violations of these rules. [See supra at p.5].

These mechanisms, designed to minimize the likelihood that "subsidized [religious school] teachers [will] inculcate religion, "make the program unconstitutional, for they "involve excessive and enduring entanglement between state and church." Lemon v. Kurtzman, supra, 403 U.S. at 619.

The District suggests [Brief at 25, 27] that the need for supervision is ameliorated by the inherently secular nature of the classes. This Court has twice rejected this very argument in regard to remedial reading and math programs identical to those at issue here, Meek v. Pittenger, 421 U.S. at 370-71; Public Funds for Public Schools v. Marburger, 358 F.Supp. 29, aff'd, 417 U.S. 961 (1974).

The subject matter of "shared time" classes, as well as those of many of the "community education" programs, are not so cut and dried, so routine, so incapable of use to further the religious mission of the religious schools, that the supervision may be dismissed, as purely routine and standardized. PEARL v. Regan, 444 U.S. 646 (1980); Meek v. Pittinger, supra; Wolman v. Walter, supra. The relationship between a teacher and a student is varied and not easily cabined into pre-set or pre-defined categories.

Like the remedial programs involved in Meek and Wolman, the "shared time" and "community education" programs have an "educational content ... closely associated with the educational mission of the non-public school," Wolman v. Walter, supra; 433 U.S. at 244; Meek v. Pittenger, supra. Because the subject matter of the courses offered in these programs provide opportu-

nities for the transmission of sectarian views, they require a degree of supervision of the religious schools by public officials incompatible with the Establishment Clause, Wolman v. Walter, supra.

C. The Grand Rapids Program Creates Political Divisiveness

In cases such as this involving the subsidy of religious institutions, the potential for political divisiveness is a warning sign that the Establishment Clause is being violated. PEARL v. Nyquist, supra; Lemon v. Kurtzman, supra, 403 U.S. at 622-25; Walz v. Tax Comm'n, 397 U.S. at 695-96 (1970) (Harlan, J. concurring); Mueller v. Allen, supra, 103 S.Ct. at at 3071, n.11; but see Lynch v. Donnelly, supra, 104 S.Ct. at 1365, Id. at 1367 (O'Connor, J., concurring). The courts below correctly took notice of this

warning, and evaluated the entire program in light of it. [114a]

The District Court in this case found the programs generated political controversy. [109a-112a; 28a-29a] The School District injected the challenged programs into the political arena by insisting that these programs offered a reason for voters to endorse higher local property taxes to support education. Candidates for the school board supporting the increase noted that they paid for these programs. It is precisely this type of political response which is discouraged by the Establishment Clause, Lemon v. Kurtzman, supra, 403 U.S. at 622, in order to avoid the politicization of religious differences in the recurring process of allocating governmental resources.

The District emphasizes [Brief at 31] that the "shared time" and "community education" classes were open to all religious

schools, and argues that this even-handed policy lessens the dangers of political divisiveness created by the "shared time" and "community education" classes.

While discriminatory treatment would violate the Establishment Clause, Larson v. Valente, 456 U.S. 228 (1982) supra, it does not follow that even-handed subsidies are constitutional, Everson v. Bd. of Educ., supra.

That the District has entered into a partnership with a substantial portion of the religious community of Grand Rapids and injected the existence of that partnership into the political process makes that partnership all the more suspect for it runs a substantial "risk of significant religious or denominational control over [the] democratic processes..." Mueller v. Allen, supra, 103 S.Ct. at 3069, quoting Wolman v. Walter, 433 U.S. at 263 (Powell, J., concurring in part, dissenting in

part). That risk is too great for this Court to tolerate.

D. The "Shared Time" and "Community Education" Programs Have The Direct Immediate and Substantial Effect of Advancing Religion

Government may unconstitutionally aid religious education in a variety of ways: it may offer religious instruction, it may subsdize religious education, or it may "blend secular and sectarian education," Zorach v. Clauson, supra, 343 U.S. at 314. Where it does any of these, government communicates a message of endorsement of religion, Lynch v. Donnelly, supra 104 S.Ct. at 1368 (O'Connor, J. concurring). In this case, the District has done all three.

i. The District is Offering Sectarian Instruction

We have earlier discussed the "shared time" music program, and its use for religious instruction, p. 27, supra. There exists, moreover, a substantial likelihood

that some of the "community education" classes, such as those in "yearbook," would be used for that same purpose, see, p. 2, supra.

ii. The District is Subsidizing Religious Education

The "shared time" and "community education" programs subsidize religious education by "the direct transmission of assistance from the state to the schools themselves."* Mueller v. Allen, supra, 103 S.Ct. at 3069. In this case, that aid was substantial in absolute terms, and, for that reason it may be said to have a direct effect of advancing religion, cf. Meek v. Pittenger, supra, 421 U.S. at 369.

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* It is of little, if any, constitutional significance that the aid does not take the form of a direct financial subsidy, PEARL v. Regan, supra, 444 U.S. at 658-59. The United States is therefore not correct (Brief amicus at 15-16), in asserting that, under the Mueller distinction between impermissible direct aid and permissible indirect aid, the aid challenged here is to be categorized as indirect because it does not transfer funds to the schools.

But there is a far more fundamental reason for finding an impermissable effect here. Like the remedial programs invalidated in Meek v. Pittenger, supra, (421 U.S. at 371). the District was

> performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained.*

Both of the elements identified in Meek as demonstrating the existence of an impermissible effect -- "important educational services" and "schools in which education is an integral part of the dominant sectarian mission" -- are present here.

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* See Wheeler v. Barrera, 417 U.S. 402, 428 (1974) (Powell, J. concurring). ("I would have serious misgivings about the constitutionality of a statute that required utilization of public school teachers in sectarian schools."); Johnson v. Sanders, 319 F.Supp. 421 (D. Conn. 1970), aff'd, 403 U.S. 995 (1971).

a) The District Performs Important Educational Services

That the remedial and enrichment reading and math programs are "important educational services" is demonstrated by Meek. Art and music are likewise important educational services. [J.A. 101, ¶18] (art instruction part of students' "total education")* And the "community education" program offers a variety of educationally related classes, most of which are part of the ordinary public school curriculum.

It is literally true that children attending religious schools benefit from the existence of the "shared time" and "community education" programs. That fact does not support an invocation of the "child benefit" theory of Bd. of Educ. v. Allen, 392 U.S. 236 (1968). Students at-

* The shared time physical education program was described by the supervisor of the program as meeting the "educational needs of the nonpublic students." [J.A. 82, ¶¶14-15]

tending religious schools would also benefit from direct financial aid to those schools, remedial reading programs and a host of other programs already invalidated by this and other courts.

The child benefit theory is properly invoked only where religious institutions receive "indirect and incidental" benefits from "secular and nonideological services unrelated to the primary religion-oriented educational function of the sectarian school," Meek v. Pittenger, supra, 421 U.S. at 364, and not where they benefit from programs as directly related to that educational function as those challenged here.

Petitioners [Brief at 29-32] argue that the impermissible effect of the District's subsidy of religious education is diluted because "shared time" and "community education" programs are available to a broad class of students which they define

as including students attending public schools. Cf. Mueller v. Allen, supra, 103 S.Ct. at 3068-69. Since public school students can attend the equivalent of "shared time" or "community education" classes in their own schools, students attending the challenged programs are solely religious school students.

In Mueller, parents of public school students were able to take advantage of the tax deduction, over and above their right to have their children receive a free public school education. Like the tuition aid scheme invalidated in PEARL v. Nyquist, supra, the "shared time" and "community education" programs are available only to religious school students, surely not the "broad class" contemplated in Mueller v. Allen.

This Court has rejected the argument that aid to religious school students which merely duplicates the education available

to public school students is to be treated as if it were available to all students:

> [T]he argument proves too much, for it would also provide a basis for approving through tuition grants the complete subsidization of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools -- a result wholly at variance with the Establishment Clause.

PEARL v. Nyquist, supra, 413 U.S. at 782, n.38. [emphasis added]

Nor is it relevant that the challenged courses are not required by state law, for minimum curriculum requirements do not exhaust the possibilities for primary and secondary education. The record here fully supports the finding that the "shared time" and "community education" classes were educational. As one "shared time" teacher candidly put it, [J.A. 74, ¶17] "The specific aim of the program is to ... meet the educational needs of eligible

students." See also Brief at 10 (program designed to meet otherwise "unmet educational needs").

While many parents send their children to religious schools primarily for religious reasons, many others would not enroll their children unless the schools were roughly comparable academically to the public schools. See U.S. Department of Education, Private Elementary and Secondary Education: Congressionally Mandated Study of School Finance, Vol. 2 (1983) at Tables 4-2, and 4-3.

The District, by undertaking joint fiscal and professional responsibility for the operation of the educational program of the religious schools, directly and substantially furthers their ability to carry out their mission of religious education by enabling them to reach a far larger audience than they otherwise could.

b. <u>The Schools Participating in the Programs Are Pervasively Religious</u>

The religious schools participating in the "shared time" and "community education" programs are, as the District Court found after a review of the extensive record, and a visit to the schools, [J.A. 1] pervasively religious, despite petitioners' claims to the contrary. [Brief at 33-35] The participating schools are (in the words of one school) "communities of faith in which the Christian message, the experience of worship community, and social concern are integrated in the total experience of the

students ... and members of the faculty."* Prayer and religious instruction are an integral part of their curricula and students are expected to attend these activities, compare Roemer v. Bd. of Public Works, 426 U.S. 736, 756-57 (1976) (attendance at services voluntary; compulsory theology course taught as a liberal arts course).**

The schools, while claiming not to distort secular subjects to coincide with

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* Catholic Central High School, quoting the National Catechetical Directory, J.A. 242. See for similar statements, J.A. 261 (West Catholic High School); J.A. 107 (Catholic schools generally); J.A. 225 (Grand Rapids Baptist Academy); J.A. 270 (Grand Rapids Christian School Association); J.A. 271 (same); J.A. 280 (same); J.A. 149 ¶14, J.A. 151 ¶20 (Immanuel-St. James Lutheran School); ("Word of God must be an all-pervading force in the educational program."); J.A. 280 (remark of Carole Barker, teacher in a Christian school: "Everything we do has to be based on scriptures ... and that can be intertwined in everything that I teach").

** (See, e.g., J.A. 149-50 (Immanuel St. James Lutheran School); J.A. 136 ¶10 (Grand Rapids Christian School Ass'n); J.A. 113-14 (Grand Rapids Catholic Schools).

religious dogma, do examine these subjects from a religious point of view,* and do teach moral (religious) values, although perhaps not in the same coercive way as was once common. In most, religion was far more pervasive than merely incidental excursions into religious viewpoints.** Religious symbols were typically displayed in the classroom and hallways [J.A.].

In each case, governance of the school is entrusted to bodies overwhelmingly composed of adherents of the faith oper-

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* [J.A. 111 (Grand Rapids Catholic Schools); J.A. 114 (same); J.A. 134-035 (Grand Rapids Christian School Ass'n); J.A. 151-52 (Immanuel-St. James Lutheran School); J.A. 270.

** Members of the G.and Rapids Christian School Association, for example, believed that "the Word of God must be an allpervading force in the educational program." [J.A. 271] See also J.A. 242 (Catholic Central High School; J.A. 121-22, ¶9 (recognition of God part of total Catholic school education).

ating the school,* if not to the church itself or its clergy. The student bodies and the faculties were overwhelmingly adherents of the sponsoring faith.**

In short, although the schools may not duplicate in every respect the religious schools described in earlier cases in this Court,*** the "general picture" painted by the factual findings below, Roemer v. Bd. of Public Works, 426

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* [J.A. 134, 148 (Lutheran Schools); J.A. 262-67 (Catholic Schools); J.A. 271-278 (Grand Rapids Christian Ass'n)]

** J.A. 131 (Lutheran schools: teachers must be members of sponsoring congregations); J.A. 226 (Grand Rapids Baptist Academy); J.A. 280 (Grand Rapids Christian School Ass'n "teacher ... shares the values of the parents"). Teachers' freedom to teach is limited to the "general philosophical framework of the school." J.A. 117 (Catholic Schools).

*** The petitioners emphasize that none of the schools excludes members of other faiths, but neither did the schools held to be pervasively religious in Wolman v. Walter, supra.

U.S. at 758, is that these schools retain the essential religious characteristic of schools "whose affirmative if not dominant policy" is to assure future adherents to a particular faith ..." Tilton v. Richardson, 403 U.S. at 685-86.

They are decidedly unlike colleges and universities which retain merely the minimal sectarian affiliation particularly since they are engaged in the instruction of impressionable school age children, not more mature and independent minded students of college age, Tilton v. Richardson, supra 403 U.S. at 672, 685-86.

In sum, the "shared time" and "community education" classes had the primary effect of aiding religion because such assistance

> normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in [its] religious

> mission." Hunt v. McNair, 413 U.S. 734, 743 (1973)

iv. The District Fused Secular and Sectarian Education

Not only do the "shared time" and community education" programs violate the strictures of Zorach by "undertaking religious instruction, 343 U.S. at 682, and subsidizing religious education, but finally, and in many ways most fundamentally, the programs had the effect of advancing religion because they "blended secular and religious education."

> "The mere appearance of a joint exercise of ... authority by Church and State provides a significant symbolic benefit to religion.... Larkin v. Grendel's Den, supra, 103 S.Ct. at 511.

Conclusion

For the reasons stated, the joint enterprise which is the "shared time" and "community education" program violates the Establishment Clause. The judgment below

must therefore be affirmed.

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